

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-7556

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARINE CARRIERS CORPORATION,

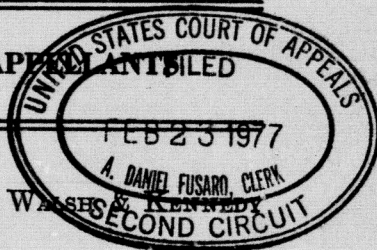
Plaintiff-Appellee,

versus

**DIRECTOR GENERAL OF INDIA SUPPLY MISSION and
REGIONAL DIRECTOR OF FOOD—WESTERN REGION,**

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS



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DIRECTOR GENERAL OF INDIA SUPPLY MISSION and
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BRIEF FOR DEFENDANTS-APPELLANTS

Jurisdiction

The District Court's opinion was filed on October 8, 1976. (18a).¹ Final judgment thereon was entered on October 22, 1976. (24a). Appellants Director General of India Supply Mission and Regional Director of Food-Western Region filed Notice of Appeal on November 5, 1976. (25a). The Record on Appeal was transmitted to the United States Court of Appeals for the Second Circuit on December 6, 1976. The jurisdiction of this Court is based upon 28 U.S.C. § 1291.

¹ References are to pages in Joint Appendix.

Issues Presented for Review²

1. Was the vessel AVENGER unseaworthy for lack of the harbor chart?
2. If it was, did the unseaworthiness concur to proximately cause the stranding of the AVENGER in the Gulf of Mexico on August 26, 1969?
3. If it did, had the vessel owner exercised due diligence to make the vessel seaworthy with respect to that chart?

Opinion Below

This is an appeal by Director General of India Supply Mission and Regional Director of Food-Western Region from the judgment of the United States District Court for the Southern District of New York. The judgment granted plaintiff Marine Carriers Corporation general average contribution for expenses incurred during the salvage effort which freed the AVENGER from a position aground in the Gulf of Mexico in August and September 1969. (24a).

Statement of the Case

This is an admiralty suit for general average contribution brought in the United States District Court for the Southern District of New York by Marine Carriers Corporation (hereinafter "shipowner") as owner of the vessel AVENGER against Director General of India Supply Mis-

² Appellants' counsel, which did not participate in the trial and in the post-trial briefs, have modified and narrowed the proposed issues as set forth in Form C, after having studied the Record on Appeal.

sion and Regional Director Food-Western Region (hereinafter "cargo") as owners of the cargo on board the said vessel at a time when it stranded in the Gulf of Mexico on August 26, 1969. (3a-5a, Complaint).

The shipowner alleged that certain expenditures in the nature of general average were made to remove the vessel from the strand. Cargo did not contest the items claimed. However, it defended on the grounds that at the time of the stranding, the vessel was unseaworthy as the result of the shipowner's failure to exercise due diligence. (6a-9a, Answer). The contract of carriage entered into between the parties was contained in a charter party (47a-58a) which provided that the transportation was subject to the United States Carriage of Goods by Sea Act, 46 U.S.C. §1300 *et seq.* (55a, 57a). It also contained the so-called New Jason Clause which required cargo to contribute in general average if the incident giving rise to the general average event was from a cause for which the shipowner was not liable by statute, contract or otherwise. (55a, 57a).

In the resulting litigation, the Trial Court, Carter, J., without a jury, found that the shipowner had established the exercise of due diligence to make the ship seaworthy because the owner was attempting to complete all necessary repairs, and that if the vessel had not been ordered to move so as to allow other vessels to load the ship, the owner would have completed the repairs. (22a-23a). The Court also found that the generators' problem had no bearing on the accident, but that rather the ship went aground because of negligence or faulty navigation by the pilot, tug or captain. (23a). However, the Court did not make any finding nor reach any conclusion with respect to the vessel's failure to have a harbor chart, which appellants contended made the vessel unseaworthy.

Facts

On July 1, 1969, appellee Marine Carriers Corporation as owner of the tanker AVENGER entered into a charter party with appellant Director General, India Supply Mission, whereby the said vessel was to carry a cargo of wheat in bulk from one or two safe United States Gulf ports to Indian ports. (47a-58a).

Pursuant to this undertaking, the vessel docked in the port of Beaumont, Texas on Wednesday, July 23, 1969. She was passed for loading cargo at 1130 hours on Saturday, July 26, 1969, and her notice of readiness was accepted at 1135 hours on the same day. Thereafter, the vessel shifted to a grain elevator berth and loading commenced at 0800 hours on Monday, July 28, 1969. Loading was completed at 1125 hours on Friday, August 1, 1969. (59a-60a).

The vessel was a dead ship as of 1700 hours on July 26, 1969. (66a). She remained so until Monday, August 25, 1969 when, because her berth was required for another vessel(s), she was ordered by Ensign Danesi of the United States Coast Guard to shift to the Sabine Anchorage for further repairs and subject to a continuing Coast Guard inspection. (67a; 307a-308a; 172a). Prior to clearing her for Sabine Anchorage, Danesi tested her only main functioning generator at 50 per cent load for one hour. (307a). He thereupon ordered her to proceed to the anchorage, but told her Master, Captain Blank, that he could not exceed 60 rpms. (203a).

The only chart for the area on board the vessel was C.&G.S. #1279 coastal sailing chart, and that chart showed only one anchorage. (64a; 174a-175a). It was designated as "Fairway Anchorage", and was located in the open

waters of the Gulf of Mexico beyond the jetty. (64a; 194a-197a). Captain Blank had ordered the local chart for the Beaumont area (315a, C.&G.S. #517), but it was not furnished to him. (174a).

Blank knew of only one anchorage in the area, the "Fairway Anchorage". (172a-173a, 191a-192a). He believed it to be Sabine Anchorage, and naturally assumed that that was where he had been ordered to go by the Coast Guard. (172a-173a). Understandably, he proceeded to "Fairway Anchorage". (172a-173a). It is not disputed that had the ship proceeded to Sabine Anchorage, the incident giving rise to this litigation could never have occurred.

In retrospect, the Coast Guard's limited clearance of the vessel to Sabine Anchorage was well founded because the passage from the Beaumont dock to the Gulf of Mexico was not uneventful. At 0013 hours on August 26, the ship went aground for the first time after the overspeed on her one functioning main generator tripped out. (106a; 67a; 269a; 99a). This was the generator tested by the Coast Guard under only a 50 per cent load condition prior to the vessel leaving the Beaumont dock (307a) and presumably was thought to be adequate for the move to sheltered Sabine Anchorage. After grounding, the Master and Pilot decided that "in the interests of safety" it would be more prudent to proceed with the assistance of a tug. (189a-190a). At 0250 hours on the morning of August 26, a line was placed from the tug E. M. Black to the ship for the passage to # 4 sea buoy. (99a-100a). This buoy is located in the Gulf of Mexico beyond the Sabine Pass jetty and west of "Fairway Anchorage". (64a; 325a).

After the vessel and tug cleared the jetty and entered the Gulf of Mexico, the ship's log succinctly notes the following occurrence:

"WHILE APPROACHING SABINE PASS CHANNEL TO SEAWARD, THE TOW LINE OF E. M BLACK PARTED AND VESSEL, OPERATING AT REDUCED POWER, WAS CARRIED ONTO WEST BANK OF CHANNEL BUOY "6" & "4" AT 0634." (106a).

The ship remained aground until 0322 hours on Tuesday, September 9. (70a). At 0705 hours, she proceeded to Sabine Anchorage,³ the inside anchorage, where she anchored at 0855 hours. (70a).

The Statute

The charter party provides and the parties concede that their respective rights and liabilities are governed by the terms and provisions of the United States Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.* (55a, 57a). Relevant sections thereof are quoted below:

§ 1303. Responsibilities and liabilities of carrier and ship

Seaworthiness

(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

- (a) Make the ship seaworthy;
- (b) Properly man, equip, and supply the ship;

• • •

§ 1304. Rights and immunities of carrier and ship

Unseaworthiness

(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unsea-

³ Both deck and engine logs show that upon being refloated the vessel anchored at "Sabine Anchorage". (107a; 110a).

worthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable causes of loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

• • •

POINT I

The AVENGER was unseaworthy in that it did not have the proper chart.

"... [C]harts, light lists, and similar navigational data are essential equipment for the safe navigation of a ship, . . . she is unseaworthy without them, and it is the duty of her owner to supply them." *The Maria*, 91 F.2d 819, 824, 1937 A.M.C. 934, 942 (4th Cir. 1937); accord, *Director of India Supply Mission v. S.S. Maru*, 459 F. 2d 1370, 1372, 1972 A.M.C. 1694, 1697 (2d Cir. 1972) (unseaworthiness because of failure to update chart); *Farr v. Hain S.S. Co., Ltd.*, 121 F. 2d 940,

945, 1941 A.M.C. 1282, 1290 (2d Cir. 1941) (unseaworthiness because of failure to have latest chart).

If any doubt arises the benefit thereof should go to the cargo owner. *The Southwark*, 191 U.S. 1, 14, 24 S.Ct. 1, 48 L.Ed. 65 (1903); *The Vizkaya*, 63 F. Supp. 898, 904 (E.D. Pa. 1945); *Mongolian Prince*, 27 F.2d 985, 987, 1928 A.M.C. 1201, 1205 (E.D.N.Y. 1928).

Chart C.&G.S. #517 (325a) was not on board the AVENGER. (174a-175a). This large-scale harbor chart showed the anchorage at Sabine Pass as well as the anchorage at Fairway. (325a). Also, chart #517 depicted channels, navigational aids and other facilities in and about Sabine Pass and Lake. (325a). The AVENGER did have on board chart C.&G.S. #1279, which was a small-scale coast chart. (64a; 174a-175a). Chart #1279 did not show the anchorage at Sabine Pass. (64a).

A renowned navigation authority discusses the relative scale of navigational charts and their uses:

“Coast charts are intended for inshore coastwise navigation where the course may lie inside outlying reefs and shoals, for entering or leaving bays and harbors of considerable width, and for navigating large inland waterways. The scales range from about 1:50,000 to 1:100,000.

Harbor charts are intended for navigation and anchorage in harbors and small waterways. The scale is generally larger than 1:50,000.” (emphasis added). N. BOWDITCH, H.O. PUB. NO. 9, AMERICAN PRACTICAL NAVIGATOR, AN EPITOME OF NAVIGATION 104 (1966).

Coast chart #1279 (on board) had a scale of 1:80,000. (64a). Harbor chart #517 (not on board) had a scale of 1:40,000. (325a). Captain Blank readily recognized the

advantages of a large-scale harbor chart over a smaller-scale coastal chart. (Pl. Ex. 18 at 41—Blank Dep. Not in Appendix). Since the absent harbor chart #517 showed the anchorage to which the AVENGER was directed to by the Coast Guard, there can be no question but that the AVENGER was unseaworthy in not having this chart on board.

POINT II

The unseaworthiness concurred to proximately cause the stranding.

The Trial Court found "... that the ship went aground because of negligence or faulty navigation by the pilot, tug or captain." (23a). This is an excepted cause. 46 U.S.C. § 1304(2)(a). Once the shipowner has proven an excepted cause, cargo has the burden to prove a concurrent non-excepted cause. *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580, 588, 1971 A.M.C. 539, 548 (2d Cir. 1971); *In Re Grace Line Inc.*, 517 F.2d 404, 407, 1975 A.M.C. 991, 993 (2d Cir. 1975); *Yawata Steel Co., Ltd. v. Anthony Shipping Co., Ltd.*, 396 F. Supp. 619, 621 (S.D.N.Y. 1975) (Lumbard, Circuit Judge).

The AVENGER was unseaworthy for lack of the harbor chart. (Point I, *supra* at pp. 7-9).

The AVENGER stranded in the Gulf of Mexico after she had passed the Sabine Anchorage to which the Coast Guard directed her. (325a). If the AVENGER had gone to that anchorage, she could not have stranded when and where she did. To put it another way, had she proceeded to the correct anchorage, the casualty could not have occurred.

There is no doubt that Captain Blank was informed by the Coast Guard to proceed to the inner anchorage at

Sabine Pass. (172a-173a, 177a-178a, 179a, 193a, 209a-210a). Blank testified that he consulted chart C.&G.S. #1279 which he had on board the vessel. (232a). This chart showed "Fairway Anchorage" only. (64a). Since he had ordered the harbor chart (173a-174a), he would have consulted it rather than the coastal chart, and he would have learned that there were two anchorages in the area—the closer one in the sheltered waters at Sabine Pass, and the more distant one in the open waters of the Gulf of Mexico a Fairway. Captain Blank never had the opportunity to proceed to the correct anchorage because his owner failed to provide him with the harbor chart.

"[T]he navigation of a ship defectively equipped by a crew aware of her condition does not relieve the owner of his responsibility or transform unseaworthiness into bad seamanship." *The Maria*, 91 F.2d 819, 824, 1937 A.M.C. 934, 943 (4th Cir. 1937).

Captain Blank was an experienced mariner. (157a). He held an unlimited American Master's License (156a) which was issued by the Coast Guard. (Def. Ex. C. Not in Joint Appendix). "[A]s a Master . . . [he] . . . couldn't go anywhere without permission from the Coast Guard. . . ." (169a). He was given limited clearance by the Coast Guard to Sabine Anchorage pending the completion of further repairs and a continuing Coast Guard inspection. (307a). Upon learning that there were two anchorages on chart C.&G.S. #517, he would have concluded that Sabine Anchorage was at Sabine Pass—not at Fairway—or he would have at least inquired of the Coast Guard.⁴ In any event,

⁴ Parenthetically, had Blank inquired locally, he would have undoubtedly been directed to the anchorage at Sabine Pass. A local tug company published a map of the ports area and surrounding waters which showed the location of Sabine Anchorage. (65a).

he would have proceeded to the inner anchorage at Sabine Pass⁵, and the accident never could have occurred. Accordingly, the lack of a large-scale harbor chart was a concurring cause of the stranding.

This Court most recently accepted the general proposition that if navigational information is not aboard a vessel, that fact may concur in an "immediate" cause of error in navigation to proximately cause a casualty at sea. *American Smelting and Refining Co. v. S.S. Irish Spruce*, Docket Nos. 75-7441, 75-7445 (2d Cir., filed Jan. 17, 1977). This case concerned a vessel which stranded after proceeding through darkened and dangerous waters at full speed using dead reckoning only. The lower court found the ship unseaworthy because it did not have on board the 1971 edition of the British Admiralty List of Radio Signals, which listed the San Andres beacon; and that if this beacon had been employed the stranding probably would have been avoided. It concluded that the unseaworthiness concurrently and thereby proximately cause the loss, and denied the shipowner's recovery in general average. This Court reversed upon finding that the San Andres beacon information was on board the Irish Spruce in an earlier 1969 edition of the same publication. Although it was not as clearly shown as in the later edition, it could have been found by a "reasonably conscientious navigator." Accordingly, the stranding was not proximately caused by inadequate navigational information on board the vessel, but rather was caused by the failure of the vessel's navigator to properly use the adequate information which was on board.

In the case at bar, the lack of the large-scale harbor chart concurred to proximately cause the stranding, not-

⁵ Indeed, after the vessel was refloated on September 9, 1969, she proceeded to that anchorage, which was designated in both deck and engine logs as "Sabine Anchorage."

withstanding the fact that the immediate cause was an error in navigation.

POINT III

The owner of the AVENGER did not exercise due diligence to obtain the proper chart.

Once it has been established that unseaworthiness concurrently caused the stranding, the burden of proof shifts to the vessel owner to prove the exercise of due diligence to make the vessel seaworthy. 46 U.S.C. § 1304 (1); *Hellenic Lines Ltd. v. Life Ins. Corp. of India*, 526 F.2d 830, 831, 1975 A.M.C. 2457, 2458 (2d Cir. 1975). The duty of an owner to use due diligence to make his ship seaworthy is nondelegable. *The Maria*, 91 F.2d 819, 824, 1937 A.M.C. 934, 942-43 (4th Cir. 1937).

The shipowner offered no evidence to show that due diligence was exercised to obtain the harbor chart. The record is totally barren as to what efforts it made to obtain the harbor chart from July 18, 1969 when the vessel was directed to Beaumont, Texas⁶ to August 25, 1969, when she departed Beaumont⁴.

Although Captain Blank requested charts, none were provided. It is inconceivable that a diligent shipowner employing present day communication and transportation could not have obtained a current chart for a major United States port during the course of a 39 day search.

⁶ Pl. Ex. 15A Rough Deck Log for July 18, 1969—Not in Joint Appendix.

CONCLUSION

The judgment of the Court below which allowed plaintiff to recover of defendants in general average should be reversed and the complaint should be dismissed with costs in that and in this proceeding.

Respectfully submitted,

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